

No. 15115.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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RALPH O. HUTCHENS,

*Appellant,*

*vs.*

LOUIS D. FAAS, BERNICE H. FAAS, LEONARD A. FAAS,  
GENEVIEVE E. FAAS, Co-partners doing business as  
KING O'LAWN MANUFACTURING Co.; WALTER FAAS,  
RUDOLPH FAAS, M. W. ENGLEMAN, Assignee for Bene-  
fit of Creditors for KING O'LAWN MANUFACTURING  
Co., KING O'LAWN, INC., a California Corporation,

*Appellees.*

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## APPELLANT'S REPLY BRIEF.

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**FILED**

**SEP 11 1956**

**PAUL P. O'BRIEN, CLERK**



## TOPICAL INDEX

	PAGE
Reply to Appellees' Point I.....	1
Reply to Appellees' Point II.....	3
Reply to Appellees' Point III.....	6
Reply to Appellees' Point IV .....	6
Reply to Appellees' Point V.....	7
Conclusion .....	8

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## TABLE OF AUTHORITIES CITED

CASES	PAGE
Machine Co. v. Murphy. 97 U. S. 120.....	5
Montgomery Ward & Co. v. Clair, 51 U. S. P. Q. 499.....	7
Topliff v. Topliff, 145 U. S. 156, 36 L. Ed. 658, 12 S. Ct. 825, 1892 C. D. 402.....	4



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## APPELLANT'S REPLY BRIEF.

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### Reply to Appellees' Point I.

The defendant appellees' contention that all of the claims at issue, including Claim 16, read squarely and without equivocation upon the machine shown in appellees' physical Exhibit C is clearly erroneous, as may easily be seen from an inspection of Sheet 4 thereof which is included in the appendix of appellees' brief. In appellees' physical Exhibit C, Sheet 4, Claim 16 of appellant's patent No. 2,719,398 has been broken down into the various elements defined therein and in conjunction therewith four photographs of appellees' Exhibit B have been included,

which is a machine made in accordance with the drawings of appellant's patent No. 2,618,919. In this breakdown, Element E is,

“and mounting means positioned on one side of said base that adjustably support said first member for longitudinal and rotatable movement, which mounting means so supports said member that said belt is in vertical alignment with at least a portion of said driven and driving pulleys when said member is so disposed as to support said cutter in either a horizontal or vertical position.”

and an arrow extends therefrom which purports to designate this element and show the location thereof in the photograph of appellees' Exhibit B. It will be apparent, however, from an inspection of said Exhibit B that the element described and the portion of Exhibit B to which the arrow is directed are not one and the same, but are completely different structures. What the arrow actually points to and designates is one of the side members 1 or 2 which are disclosed in Figure 2 of appellant's patent No. 2,618,919 and described in the patent specification in Column 2, lines 4 to 7 thereof as “the side members 1 and 2 of the frame extend forwardly of the base and have racks 4 and 23.1 united to or formed integral therewith at the forward end.” A further inspection of the drawings of patent No. 2,618,919, particularly Figures 1 and 2 thereof, will show that two plates 21 and 22 are pivotally supported from the forward extremities of side members 1 and 2 and that levers 12 and 13 extend upwardly therefrom, which levers may be operated independently to adjust the height of the rotatable cutting members 10 and 19 which are supported by elongate structures that extend forwardly from the plates.

Obviously any prior use of the device disclosed in appellant's patent No. 2,618,919 or shown in appellees' physical Exhibit C cannot invalidate the claims in suit, for each of these claims carries the structural limitation of a cutter supporting member which is disposed to one side of the base and extends forwardly therefrom. Certainly this structural limitation precludes any possibility that the claims in suit read on or describe the devices shown in appellee's physical Exhibit C and in appellant's patent No. 2,618,919 which include as essential elements:

(a) side members 1 and 2 that extend forwardly from a base;

(b) racks 4 and 23.1 united to or formed integral with said side members at their forward ends;

(c) levers 12 and 13;

(d) plates 21 and 22 that pivotally support said levers from the forward end portions of said side members;

(e) two elongate cutter supporting assemblies extending forwardly from plates 21 and 22 and rigidly affixed thereto.

These elements (a) to (e) inclusive are not included in the combination of elements defined by the claims in suit, and would serve no useful function if so included.

### **Reply to Appellees' Point II.**

Appellees' contention that the claims in suit cannot be interpreted broadly enough to be infringed by the accused device is without basis or foundation, for as previously argued, the claims in suit do not read on or describe the device shown in appellees' physical Exhibit C nor the device disclosed and described in appellant's patent

No. 2,618,919. Furthermore, the claims in suit do not read upon the device disclosed or claimed in the Boggs patent, nor upon the Boggs device, which is the same as shown in the Boggs patent drawing. The Boggs patent was cited as a reference by the Patent Office during the time the claims in suit were under prosecution, and these claims were subsequently allowed without alteration by the Patent Office over the Boggs disclosure. Appellees have presented no evidence of any type whatsoever to substantiate the contention that the Boggs device could be used for any purpose other than the lawn edging, in contrast to the invention defined in the claims in suit which is adapted for the edging and trimming of lawns with but a single power-driven rotatable cutter.

In *Topliff v. Topliff*, 145 U. S. 156 at 161, 36 L. Ed. 658, 12 S. Ct. 825, 1892 C. D. 402, Mr. Justice Brown stated:

“While it is possible that the Stringfellow and Surles patent might, by a slight modification, be made to perform the function of equalizing the springs which it was the object of the Augur patent to secure, that was evidently not in the mind of the patentees, and the patent is inoperative for that purpose. Their device evidently approached very near the idea of an equalizer; but this idea did not apparently dawn upon them, nor was there anything in their patent which would have suggested it to a mechanic of ordinary intelligence, unless he were examining it for that purpose. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions.”



Appellees' contention that the claims in suit do not cover the accused device because the claims require that the "wheel means" itself permit angular adjustment of the base, is without foundation, for appellees likewise use wheel means for this precise purpose as so admitted in reply to Request for Admission of Facts 5, 6, 7, 8 and 11 [Tr. pp. 5-7 and 37-38]. In an attempt to circumvent infringement of the claims in suit appellees have used a plurality of wheels to adjustably support the base relative to the ground surface rather than a single wheel as shown in the drawings of the patent in suit. In the narrower claims of the patent in suit, such as Claims 1 to 5 inclusive, appellant has defined his invention as including a supporting wheel journaled to the base. However, appellant realized that other wheel arrangements could be utilized to adjustably support the base relative to the ground surface, and accordingly in the broader claims, such as Claim 16, has defined the invention more broadly; namely, by "wheel means that movably support said base for angular adjustment thereof relative to the surface on which said wheel means rests." The three-wheel support utilized in the accused device is the equivalent of the single wheel disclosed in the drawing and described in the specification of the patent in suit. In *Machine Co. v. Murphy*, 97 U. S. 120, 125, the question of equivalence was considered and the Court stated:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what

office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result."

### **Reply to Appellees' Point III.**

Appellees' discussion as to the co-pendency of appellant's two patent applications, Serial No. 168,506 and Serial No. 419,916, is not considered material or relevant to the infringement of the claims in suit, as each of these applications defined and claimed a completely separate and distinct invention. The claims in suit carry structural limitations that preclude them from reading on or describing appellees' Exhibit B, or the device disclosed and described in appellant's patent No. 2,618,919. Hence, for the reasons previously submitted in detail, there is no possibility that the claims in suit can be invalidated by prior public use of appellees' Exhibit B.

### **Reply to Appellees' Point IV.**

The appellees admit that the accused structure has a base which can be angularly adjusted, but in spite of their replies to Requests for Admission of Facts 5, 6, 7, 8 and 11 [Tr. pp. 5-7 and 37-38], appellees do not admit that the wheel means movably support the base for such adjustment. Instead, appellees attempt to explain away their replies to the above-mentioned Request for Admissions on the grounds that adjustment in the accused device is obtained by a leverage or linkage system and not

by the wheel means. By a play on words appellees seek to confuse the issue of infringement when they describe their three wheels as a leverage or linkage system rather than “wheel means that movably support said base for angular adjustment thereof relative to the surface on which said wheel means rests,” as set forth in Claim 16. Whether infringement exists depends upon the actual structure incorporated in the accused device, and not on what appellees choose to term this structure. In *Montgomery Ward & Co. v. Clair*, 51 U. S. P. Q. 499, 503 (C. C. A. 8) the Court stated:

“It is settled that to sustain the charge of infringement the infringing device must be substantially identical with the one alleged to be infringed in (1) the result attained; (2) the means of attaining that result; and (3) the manner in which its different parts operate and cooperate to produce that result.”

Taking these criteria in order, the elements in the accused device are so combined as to (1) provide the same result attained by the combination of elements defined in the claims in suit; (2) utilize the same means of attaining those results; (3) and the elements cooperate to produce those results in the same manner as the elements in applicant’s invention. Clearly, the elements in the accused device are so combined as to infringe the claims in suit.

### Reply to Appellees’ Point V.

Should the Court of Appeals reverse the District Court’s judgment of non-infringement, the Court of Appeals should remand the case for determination of the issue of validity for:

(a) The Trial Court expressly did not rule on this issue [Tr. p. 68].

(b) Appellees introduced as evidence in the trial the testimony of three witnesses including defendant Louis Faas in an attempt to invalidate the patent in suit.

(c) These three witnesses are not before the Court of Appeals, and the Court of Appeals is accordingly not in as good a position to evaluate their testimony as the Trial Court.

### Conclusion.

The judgment of non-infringement should be reversed and the case remanded for trial on the issue of validity.

Dated August 30, 1956.

Respectfully submitted,

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